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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35785

THE THREE RIVERS RAILWAY COMPANY—CORPORATE FAMILY MERGER EXEMPTION—MAHONING STATE LINE RAILROAD COMPANY

Digest:[1] The Three Rivers Railway Company and the Mahoning State Line Railroad Company appealed a Director's Order on a notice of exemption that required employee protective conditions for a corporate family transaction. The Board is unable to reach a majority decision. Accordingly, the appeal cannot be granted and the Director's Order remains in effect.

Decided: May 12, 2015

The Three Rivers Railway Company (TRRC) and the Mahoning State Line Railroad Company (MSLR) (collectively, applicants) filed an appeal of a Director's order served and published in the Federal Register on December 6, 2013 (Director's Order) (78 Fed. Reg. 73,585) regarding a notice of exemption covering a merger within a corporate family. Specifically, applicants appeal the Director's imposition of employee protective conditions, asserting that employee protection does not apply under 49 U.S.C. § 11326(c) because the parties to the transaction are both Class III carriers.

Before filing their verified notice of exemption, MSLR, a Class III carrier, was a wholly owned subsidiary of TRRC, also a Class III carrier. TRRC, in turn, was a subsidiary of CSXT, a Class I carrier. Thus, CSXT controlled TRRC directly and MSLR indirectly. According to the applicants, TRRC and its predecessors have operated MSLR since 1895, but no operations have been conducted over MSLR's line between Bentley and Shaw, Pa., since early 1989.

On November 21, 2013, TRRC and MSLR filed their verified notice of exemption under 49 C.F.R. § 1180.2(d)(3) for a corporate family transaction under which MSLR would merge with and into TRRC. As a result of the corporate family transaction, the two Class III carriers, TRRC and MSLR, would be merged into one entity—TRRC—directly controlled by CSXT, and CSXT's indirect control of MSLR as a separate entity would be eliminated.[2]

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[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] The exemption became effective on December 21, 2013. The record does not indicate whether the parties consummated the transaction during the pendency of this appeal.

According to applicants, the purpose of the transaction is to reduce corporate overhead and duplication by eliminating one corporation while retaining the same assets to serve customers. Further, applicants maintain that TRRC would obtain certain savings as a result of the transaction. Applicants state that the corporate family merger would not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.

The Director's Order stated that, because CSXT is a Class I carrier, any employees adversely affected by the transaction would, as a condition to the use of the exemption, be protected by the employee protective conditions set forth in New York Dock Railway—Control—Brooklyn District Eastern Terminal, 360 I.C.C. 60 (1979).

In their appeal of the Director's Order, applicants argue that the order reflects a legal conclusion that is contrary to law, Board precedent, and Board policy. According to applicants, their filed notice correctly stated that, under § 11326(c), no employee protection is imposed on a transaction involving only Class III railroads. TRRC and MSLR assert that because they are the only applicants and are both Class III carriers, the corporate family transaction is not subject to employee protective conditions.

We have considered the record before us but are unable to reach a majority decision. Accordingly, TRRC's and MSLR's appeal cannot be granted, and the Director's Order remains in effect as served and published.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. TRRC's and MSLR's appeal of the Director's Order cannot be granted, as the Board was unable to reach a majority.

2. The Director's Order remains in effect as served and published.

3. This decision is effective on its date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman. Acting Chairman Miller and Vice Chairman Begeman commented with separate expressions.

ACTING CHAIRMAN MILLER, commenting:

Under 49 C.F.R. § 1011.7(a)(2)(x)(C), the Board has delegated to the Director of the Office of Proceedings (Director) the authority initially to determine whether to issue notices of exemption under 49 U.S.C. § 10502 for rail transactions under 49 U.S.C. § 11323. The Board has reserved for itself the consideration and disposition of all appeals of initial decisions issued by the Director under § 1011.7. See 49 C.F.R. § 1011.2(a)(7). Here, applicants argue that the Director's Order should not have included employee protection. For the reasons discussed below, I find that the Director properly applied employee protection in this transaction.

Absent an exemption, this corporate family transaction would fall under 49 U.S.C. § 11323(a)(1) and the standards and procedures at §§ 11324-25. But even under an exemption, the related employee protection requirements set out in § 11326 still apply.[1] Subsection 11326(a) establishes the general rule that when approval is sought for a transaction under §§ 11324-25, the Board "shall require" certain specified employee protection. However, subsection 11326(c) carves out an exception to that general rule: when approval is sought for a transaction "involving only Class III rail carriers," § 11326—i.e., the requirement to impose employee protection—"shall not apply."

TRRC and MSLR presume that as Class III carriers and the only applicants, this is a transaction within the meaning of § 11326(c), and so no employee protection applies.[2] But that is not so. For purposes of determining whether employee protection should be imposed under § 11326, the Board has interpreted "involving" broadly to include not just applicants themselves, but other carriers within the relevant corporate family.

Given the nature of the transaction in this case, and the relationship of CSXT to TRRC and MSLR, I believe that CSXT is sufficiently "involved" in the transaction—despite its name not being on the verified notice of exemption—to warrant imposing employee protective conditions on this corporate family restructuring. Indeed, CSXT's involvement in this transaction is greater and more direct than in other cases where employee protection was applied to non-applicants.[3] Here, not only is CSXT present in the corporate family being reorganized, it

[1] Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees.

[2] Appeal 5-6.

[3] In 1997, the Board noted that the employee protection applicable to control transactions pursuant to § 11323 "involving" a Class II carrier would apply to future Class III acquisitions of control by a railroad holding company due to the mere presence of a Class II carrier in the holding company's corporate family. See Genesee & Wyo., Inc.—Continuance in Control Exemption—Ill. & Midland R.R., FD 32863, slip op. at 5 n.10 (STB served Oct. 1, 1997) (noting (continued . . .)

is the top carrier in that family, a direct parent of one applicant and an indirect parent of the other. Because CSXT controls TRRC directly and MSLR indirectly, the transaction is presumably taking place with CSXT's tacit consent (if not its express direction). The transaction will also change CSXT's relationship with MSLR, one of its Class III subsidiaries, as that carrier will cease to exist as a separate CSXT indirect subsidiary. Lastly, the parties expect that the transaction will increase the surviving Class III carrier's efficiency and reduce its costs, benefits that will be realized within CSXT's corporate family.

Applicants correctly point out that the notice of exemption issued in Winston-Salem Southbound Railway—Corporate Family Transaction Exemption—High Point, Thomasville & Denton Railroad (Winston-Salem), FD 35388 (STB served Apr. 16, 2010), in which a Class III carrier that was directly controlled jointly by two Class I carriers merged with its wholly-owned Class III subsidiary, did not include employee protection.[4] Winston-Salem, however, is not precedent binding on the Board. Both the notice in Winston-Salem and the notice here were issued pursuant to authority delegated by the Board under 49 C.F.R. § 1011.7(a). To the extent that the notices in Winston-Salem and this case differ with respect to employee protection, the Director Order in Winston-Salem is no more binding on the Board than the Director Order here; the Board retains the prerogative to determine whether, under the circumstances, a transaction of this nature is one "involving" the Class I parent in addition to the Class III carrier applicants. See 49 C.F.R. § 1011.2(b) (the Board may bring before it any matter assigned to a Board employee).

For the reasons discussed here, I conclude that this transaction does "involve" CSXT and the notice here properly included employee protection.

Applicants also assert that "the change in control within a single corporate family has long been held not to require Board approval"[5] and thus employee protection should not apply

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(. . . continued)
that because a subsidiary of noncarrier Genesee & Wyoming Inc. (GWI), had become a Class II carrier, any subsequent GWI acquisition or continuance in control of a Class III carrier would be subject to the employee protection for transactions "involving" a Class II carrier under subsection 11326(b)). Since then, that principle has been applied repeatedly, including in acquisitions of control of Class III carriers as well as corporate family restructurings. See, e.g., Genesee & Wyo. Inc.—Corporate Family Transaction Exemption, FD 35764 (STB served Sept. 13, 2013); Watco Holdings, Inc.—Acquis. of Control Exemption—Ann Arbor R.R., FD 35699 (STB served Jan. 11, 2013); Genesee & Wyo. Inc.—Acquis. of Control Exemption—Arizona E. Ry., FD 35537 (STB served Aug. 18, 2011); Genesee & Wyo. Inc.—Control Exemption—Rail Partners, L.P., FD 34708 (STB served June 24, 2005); Genesee & Wyo. Inc.—Control Exemption—ETR Acquis. Corp., FD 34148 (STB served Feb. 28, 2002).

[4] Appeal 6.

[5] Appeal 5.

here. However, this assertion is misplaced. The issue here is not whether Board approval is required in a control proceeding; even the applicants do not dispute that approval is needed for this transaction. Thus, the cases cited by applicants to support this assertion are not relevant.

Instead, having concluded that the transaction does require Board approval, the question is whether employee protection should be applied. Applicants cite to two cases, Georgia & Florida Railroad—Acquisition, Lease, & Operation Exemption—Norfolk Southern Railway (G&F), FD 32680 et al. (STB served Mar. 18, 1996), and New England Central Railroad—Acquisition & Operation Exemption—Lines Between East Alburgh, Vermont, & New London, Connecticut (NECR), FD 32432 (ICC served Dec. 9, 1994), aff'd sub nom. Brotherhood of Railway Signalmen v. ICC, 63 F.3d 638 (7th Cir. 1995), in support of their claim that such protection does not apply. In G&F and NECR, a noncarrier entity within a corporate family acquired a line of railroad from an unrelated carrier, thus becoming a carrier itself. Because the noncarrier's corporate family in each case already included at least one existing carrier, those cases each involved two distinct transactions requiring agency authority: the line acquisition by the noncarrier under 49 U.S.C. § 10901 and the parent's continuance in control, under then-section 11343,[6] of the noncarrier upon its becoming a carrier. Labor interests argued in each case that the noncarrier was created solely to facilitate its parent's acquisition of rail lines and therefore, the acquisition and control transactions should be viewed as one. As a result, the labor interests argued, employee protection required under the § 11343 control transaction within the corporate family should also apply to employees of the unrelated line-selling carrier in the § 10901 acquisition, even though § 10901 itself did not require it.[7] In each case, the agency rejected that argument and declined to apply the control transaction's employee protection to the employees of the unrelated line-selling carrier in the § 10901 acquisition.

Applicants argue that because the agency ruled in those cases that the related acquisition and control transactions are properly viewed as separate and distinct, employee protection should similarly not apply here, as no authority is needed for CSXT to continue in control of TRRC (even though Board authority is required for MSLR to merge into TRRC).[8] But the facts here are unlike those in G&F and NECR, where the transaction adversely affecting the line-selling carrier's employees (the § 10901 line sale) was distinct from the transaction under which employee protection was sought for those employees (the § 11323 continuance-in-control process). Here, there is no § 10901 transaction involving a selling carrier outside the corporate

[6] Under the law applicable in G&F and NECR, provisions similar to those now at 49 U.S.C. § 11323 were codified at § 11343, and the related employee protection provisions, which are now at § 11326, were codified at § 11347.

[7] Subsection 10901(c), which prohibits the Board from imposing employee protection in transactions under § 10901, does not provide for the broader inquiry implied by the use of the word "involving" in § 11326(c).

[8] Appeal 7.

family. Rather, this case involves a single transaction under § 11323—a reorganization within CSXT's existing corporate family, including a merger of two of its Class III subsidiaries. And it is this transaction that could adverse impacts to affected employees and so for which employee protection is being imposed.[9] Accordingly, the facts underlying this agency's decisions in G&F and NECR are not comparable to the facts of this case.[10]

Thus, the only issue to be determined here is whether a Class I or II carrier is "involv[ed]" under § 11326(c). As I have explained above, CSXT is "involved" within the meaning of § 11326(c).

Consequently, for the reasons discussed above, I would deny applicants' appeal of the employee protective conditions imposed in the Director's Order.

[9] Because there have been no operations over the Line in about 25 years, the transaction will likely have no adverse effects on particular employees. But the imposition of employee protective conditions does not turn on whether there are actually any affected employees but on the nature of the transaction. If the transaction is one to which employee protection applies, those provisions are imposed. Cf. Chi., Ill.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1036, slip op. at 3 (STB served July 10, 2009) (noting that employee protection "is mandatory notwithstanding the alleged absence of adversely affected employees").

[10] The G&F and NECR precedent is applicable in another Board decision issued today, Rapid City, Pierre & Eastern Railroad—Acquisition & Operation Exemption—Dakota, Minnesota & Eastern Railroad (RCPE), FD 35799, et al. (STB served May 14, 2015). In RCPE, the Board unanimously refused to extend labor protective conditions that are part of a control transaction under § 11323 to a related acquisition transaction under § 10901. Here, the nature of the transaction and thus the approval being sought is different from RCPE, as this case does not even involve a transaction under § 10901.

VICE CHAIRMAN BEGEMAN, commenting:

I would have supported granting the appeal of the 2013 Director's Order at issue because it is contrary to law and precedent. The Board's governing statute provides direction for when employee protective conditions apply in transactions involving rail carriers. Our statute and precedent establish that such conditions do not apply when the transaction involves Class III carriers.[1] Yet in this case, the Director imposed employee protective conditions on two Class III carriers, TRRC and its wholly-owned subsidiary MSLR.

The decision presented to me would have upheld the 2013 Director's Order. That decision relied heavily upon the suggestion that the Director's order in Winston-Salem is not precedent binding on the Board and the argument that this imposition of protective conditions is a "natural" extension of other Board policies. As that decision failed to present a clear and persuasive justification for departing from both precedent and a plain reading of the statute, I could not support it.

[1] See 49 U.S.C. § 11326(c); Winston-Salem Southbound Ry.—Corporate Family Transaction Exemption—High Point, Thomasville & Denton R.R. (Winston-Salem), FD 35388 (STB served Apr. 16, 2010) (Director does not impose employee protective conditions in transaction involving two Class III carriers).